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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 542

IN THE MATTER OF

BURTON COAL COMPANY, et al.,

Debtors.

MARJORIE HAIR BURTON, individually and as Administratrix of the Estate of Frederic A. Burton, deceased,

Petitioner,

vs.

J. ROY BROWNING, Trustee and FREEMAN COAL MINING CORPORATION,

Respondents.

REPLY TO OPPOSING BRIEF RE PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN J. DOWDLE,
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MAY IT PLEASE THE COURT:

Respondents at pages 4 and 5 of their opposing brief set forth reasons for their contention that the claims asserted by petitioner and the controversy arising thereunder do not involve matters and proceedings in bankruptcy. We

shall consider the reasons advanced by respondents in the order in which they are proposed:

> "(a) petitioner is neither a creditor nor a stockholder of the debtor company nor a party in interest and hence is wholly a stranger to the proceedings." (p. 4 Resp. brief)

We reiterate. Petitioner is not and has never claimed to be either a creditor or a stockholder of the debtor company. We contend that petitioner has a right to intervene in this proceeding under Rule 24 (a)(3) of the Federal Rules of Civil Procedure, because she is adversely affected by a distribution or other disposition of property in the custody of an officer of the bankruptcy court. It is our contention that if the debtor ever had a claim to or an interest in petitioner's property it vested in the Trustee Browning at the time he was appointed by the Court in this proceeding.

The Trustee did not settle or adjust the claim in the plan, so that he still retains it and as Trustee, he alone has authority to enforce it under the direction of the bankruptcy court. This controversy therefore involves a matter and proceeding in bankruptcy, and, the bankruptcy court has the exclusive right to determine in what manner the claim against the petitioner shall be enforced.

> "(b) if the trustee had any claim in the lands referred to in the present petition, petitioner would have no interest therein." (p. 4, Resp. brief)

The meaning of this statement is not clear, but if the respondents mean that, if the Trustee has a claim which the bankruptcy court determines to be valid, such an adjudication would extinguish petitioner's interest to the extent that the bankrupcy court determines, then we subscribe. The corollary of respondents' statement is also true: that if the Trustee had no valid claim in the lands

referred to in the present petition, petitioner would have all of the interest therein.

> "(c) There was no estate in bankruptcy any longer in the course of administration for the reason that the Plan of Reorganization had been fully consummated and by its express terms had taken all of the assets and property out of the hands of the Trustee and vested it in the Freeman Coal Mining Corporation." (pp. 4 and 5, Resp. brief)

The provisions of the plan of reorganization confirmed in this proceeding are binding upon the debtor and upon the Freeman Coal Mining Corporation which acquired the property under the plan. Chapter X, Art. 11, Sec. 224, subpar. 1, Bankruptcy Laws of 1938. The plan did not deal with petitioner's lands or any interest therein. The Trustee did not in any manner proceed against said lands or against petitioner. The claim against petitioner was not settled or adjusted in the plan.

Under this circumstance, Sec. 216, subparagraph 13 of the Bankruptcy Laws of 1938, directs that the claim shall be retained and enforced by the Trustee. This provision of the bankruptcy law utterly destroys the pretense of respondent Freeman Coal Mining Corporation that it in some covert manner obtained a special warrant to enforce the claim against petitioner in a state court and in the place and stead of the duly appointed trustee.

> "(d) The controversy is manifestly between the Freeman Coal Mining Corporation and the petitioner, both strangers to the bankruptcy proceedings." (p. 5. Resp. brief)

The Freeman Coal Mining Corporation was organized under the provisions of the Plan to acquire the property of the debtors as set forth in said Plan (R. 21, 22). Upon confirmation of the Plan the Freeman Coal Mining Corporation came under the jurisdiction and was subject to

the direction of the Bankruptcy Court. The order of confirmation so provided (R. 35). It is utterly absurd for the respondent Freeman Coal Mining Corporation to say it is a stranger to proceedings from which it acquired $325,000 in current assets, cash or its equivalent, and approximately $600,000 in fixed assets (R. 31). Petitioner was a stranger to the bankruptcy proceedings and that is why she asks leave to intervene of right in this proceeding under Rule 24 (a)(3) of the Federal Rules of Civil Procedure.

Furthermore, if the respondent Freeman Coal Mining Corporation is a stranger to these proceedings, as it contends, then by what right does it contest petitioner's intervention?

The Freeman Coal Mining Corporation believes itself to be possessed of extra legal powers. This delusion is made manifest by the statement appearing at page 8 of respondents' brief. Referring to the Trustee Browning they say: "Whatever he had or whatever claims he may have asserted as Trustee had passed out of him to the Freeman Coal Mining Corporation, the corporation named in the Plan of Reorganization."

The unbroken line of decisions of this court establishes the principle that the Trustee alone may institute and prosecute causes of action belonging to a bankrupt or a debtor under the Bankruptcy Act unless the suit has been instituted prior to the appointment of the Trustee or unless the Plan of Reorganization provides some other method for their prosecution.

> "(e) the claims of the petitioners had been tried and disposed of in a court of competent jurisdiction and the decision of the Circuit Court of Cook County as affirmed by the Supreme Court of Illinois is *res judicata.*" (p. 5, Resp. brief)

We here readopt the statement appearing in our brief at page 9, which reads as follows:

> "The only question involved in this case is whether the Trustee in Bankruptcy had or has a cause of action against petitioner affecting her title to valuable coal lands. If the Trustee ever had a cause of action against petitioner he still has it and the Bankruptcy Court alone has jurisdiction to determine how it shall be enforced." Citing cases.

As this Court says, in the case of *Meyer* v. *Fleming* 327 U. S. 161, 169:

> "If the claims were to be filed after a petition for the reorganization of St. Lewis Southwestern had been approved, it could only be done with the consent of the bankruptcy court. For it has exclusive authority to determine how causes of action which have become part of the bankruptcy estate shall be enforced."

The Bankruptcy Court having exclusive jurisdiction of the subject matter, the purported decree of the Circuit Court of Cook County is a nullity and the doctrine of *res judicata* has no application.

Petitioner was, as respondents assert and as we admit, a stranger to the bankruptcy proceedings. That is why the discussion concerning matters which transpired in the bankruptcy proceedings relating to the petition of Fred A. Burton to be declared the sole stockholder of the Burton Coal Company has no relevancy. The stock ownership of the Burton Coal Company was finally adjudicated in the reorganization proceedings and as we stated in our brief at page 9, the respondents alone call the matter into question.

The petition for certiorari should be granted.

Respectfully submitted,

JOHN J. DOWDLE,
Attorney for Petitioner.

JOSEPH KEIG,
Of Counsel.

Dated October 24, 1946.